UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

KEVIN BROOKS, Petitioner, vs. R. BAKER, *et al.*, Respondents. /	)	3:12-cv-00497-RCJ-WGC **ORDER**

This action is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, by a Nevada state prisoner.

The habeas petition in the instant action challenges petitioner's state conviction in case number C-93713. Petitioner previously challenged this same conviction in this Court, filed as a habeas petition under case number 3:97-cv-457-ECR-PHA. By order filed August 4, 1998, the habeas petition in case number 3:97-cv-457-ECR-PHA was dismissed with prejudice because the claims in the petition were procedurally defaulted and petitioner failed to show that either cause and prejudice existed to excuse the procedural default, or that a fundamental miscarriage of justice would result if his procedural default was not excused. (ECF No. 16, in 3:97-cv-457-ECR-PHA). Judgment was entered on August 5, 1998. (ECF No. 17).

"Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district

court to consider the application." 28 U.S.C. § 2244(3)(A). Where a petition has been dismissed with prejudice as untimely or because of procedural default, the dismissal constitutes a disposition on the merits and renders a subsequent petition second or successive for purposes of 28 U.S.C. § 2244. *McNabb v. Yates*, 576 F.3d 1028, 1029-30 (9th Cir. 2009); *Henderson v. Lampert*, 396 F.3d 1049, 1053 (9th Cir. 2005). The instant petition is a successive petition, which requires petitioner to seek and obtain leave of the Ninth Circuit Court of Appeal to pursue. *See* 28 U.S.C. § 2244(b)(3) *et seq*. Petitioner has not presented this Court with proof that he has obtained leave to file a successive petition from the Court of Appeals. Therefore, the petition will be dismissed.

In order to proceed with any appeal, petitioner must receive a certificate of appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski,* 435 F.3d 946, 950-951 (9th Cir. 2006); s*ee also United States v. Mikels*, 236 F.3d 550, 551-52 (9th Cir. 2001). Generally, a petitioner must make "a substantial showing of the denial of a constitutional right" to warrant a certificate of appealability. *Id.;* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). "The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* (*quoting Slack*, 529 U.S. at 484). In order to meet this threshold inquiry, the petitioner has the burden of demonstrating that the issues are debatable among jurists of reason; that a court could resolve the issues differently; or that the questions are adequate to deserve encouragement to proceed further. *Id.*

Pursuant to the December 1, 2009 amendment to Rule 11 of the Rules Governing Section 2254 and 2255 Cases, district courts are required to rule on the certificate of appealability in the order disposing of a proceeding adversely to the petitioner or movant, rather than waiting for a notice of appeal and request for certificate of appealability to be filed. Rule 11(a). This Court has considered the issues raised by petitioner, with respect to whether they satisfy the standard for issuance of a certificate of appealability, and determines that none meet that standard. The Court will therefore deny petitioner a certificate of appealability.

IT IS THEREFORE ORDERED that petitioner's motion to proceed *in forma pauperis* (ECF No. 1) and all other motions in this action are **DENIED.**

IT IS FURTHER ORDERED that this action is **DISMISSED WITH PREJUDICE** as a successive petition.

IT IS FURTHER ORDERED that petitioner is **DENIED A CERTIFICATE OF APPEALABILITY.**

IT IS FURTHER ORDERED that the Clerk **SHALL ENTER JUDGMENT** accordingly.

Dated this 18th day of October, 2012.

UNITED STATES DISTRICT JUDGE